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No. 82-632

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2017, *et al.*,
Petitioners,

v.

CASPAR WEINBERGER, Secretary of Defense, *et al.*,
and PAN AMERICAN WORLD AIRWAYS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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October 12, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUSETION PRESENTED

Whether the conversion of work performed by civilian employees of the Department of Defense to work performed by a private contractor is committed to agency discretion by law in light of the Department of Defense Authorization Act, 1980 (Pub.Law 96-107) and thereby not subject to judicial review.*

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* In addition to the American Federation of Government Employees, Local 2017, the other parties appearing below were John C. Cummings, Sterling Dunn and John E. Guillebeau. In addition to Harold Brown, then Secretary of Defense, the other parties, all sued in their official capacity, appearing as defendants were Clifford Alexander, Jr., Secretary of the Army, General Donn A. Starry, Commander of the United States Army Training and Doctrine Command, General William A. Hilsman, Commander, U.S. Army Signal Corps, Fort Gordon, Georgia, and Walter L. Morris, Jr., Contracting Officer, Fort Gordon, Georgia. Pan American World Airways, Inc. appeared below as defendant-intervenor.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2017, *et al.*,
Petitioners,

v.

CASPAR WEINBERGER, Secretary of Defense, *et al.*, and PAN AMERICAN WORLD AIRWAYS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PRELIMINARY STATEMENT

Petitioners American Federation of Government Employees, Local 2017, et al., prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in *American Federation of Government Employees, Local 2017 v. Brown*, 680 F.2d 722 (11th Cir. 1982) on July 12, 1982.

OPINIONS BELOW

The order of the United States District Court for the Southern District of Georgia, No. CV180-136, was issued

on August 29, 1980.[1] The opinion of the District Court was stated in open court on August 29, 1980.[2] The United States Court of Appeals for the Eleventh Circuit affirmed the District Court's judgment on July 12, 1982.[3]

JURISDICTION

This petition for certiorari has been timely filed within the allowed time period after entry of judgment of the United States Court of Appeals for the Eleventh Circuit, issued on July 12, 1982. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTES INVOLVED

This case involves Section 806(a)(1)-(2)(A) of the Department of Defense Authorization Act, 1980, Pub.L. 96-107, 93 Stat. 813 (1979), 10 U.S.C. § 2304 note (Supp. III 1979) (hereinafter "Section 806")[4] and Sec-

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[1] Appendix B at 10a (hereinafter "Pet. App." followed by the appropriate letter and page number(s)).

[2] Pet. App. C at 11a.

[3] Pet. App. A at 1a.

[4] Section 806(a)(1)-(2)(A) of the Department of Defense Authorization Act, 1980, Pub.L. 96-107, § 806, 93 Stat. 813 (1979), 10 U.S.C. § 2304 note (Supp. III 1979) states:

> (a) During fiscal year 1980, no commercial or industrial type function of the Department of Defense that on the date of the enactment of this Act is being performed by Department of Defense personnel may be converted to performance by a private contractor—
>
> (1) to circumvent any civilian personnel ceiling; and
>
> (2) unless the Secretary of Defense shall provide to the Congress in a timely manner—
>
> (A) notification of any decision to study such commercial or industrial type function for possible performance by a private contractor, together with a certification that the government in-house cost calculation for the function is based on an estimate of the most efficient and cost effective organization for in-house performance.

tion 701(a)(2) of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1976) (hereinafter § 701(a)(2)).[5]

STATEMENT OF THE CASE

Petitioner American Federation of Government Employees (hereinafter AFGE), Local 2017 is a labor union representing federal civilian employees of the Department of the Army, Department of Defense at Fort Gordon, Georgia. Petitioners John C. Cummings, Sterling Dunn, and John E. Guillebeau are, or were at the time of the suit, federal employees at Fort Gordon, Georgia.

On June 26, 1980, the United States Department of the Army announced that it would contract out certain functions performed by federal civilian employees at Fort Gordon. These functions include housing, maintenance, supply and service, and transportation. The contract was awarded to Pan American World Airways, Inc., effective September 1, 1980. Approximately 618 civilian employees represented by American Federation of Government Employees, Local 2017, received reduction-in-force notices because of the contract award. These notices informed employees either that they would be placed in lower-graded federal jobs or terminated from federal employment. Those remaining in federal employment at lower-graded jobs would suffer an eventual loss of pay. Those employees who lost employment were offered jobs at Pan American World Airways, Inc. at lower wage and fringe benefits rates than would have been received by those employees had they remained federal employees.

On August 21, 1980, petitioners filed a complaint in the United States District Court for the Southern District

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[5] This section of the Administrative Procedure Act provides:

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> * * *
>
> (2) agency action is committed to agency discretion by law.

of Georgia seeking to enjoin the implementation of the contract between the Department of the Army and Pan American and to obtain other relief. Jurisdiction was premised upon 28 U.S.C. § 1331 (Supp. II 1978) and 28 U.S.C. § 1361 (1976). Petitioners alleged in their complaint separate violations of Section 806(a)(1) and Section 806(a)(2)(A) of the Department of Defense Authorization Act, 1980 Pub.L. 96-107, § 806, 93 Stat. 813, 10 U.S.C. § 2304 note (Supp. III 1979).[6]

Section 806(a)(1) prohibited the Department of Defense from contracting out work performed by civilian workers to a private contractor when done to circumvent civilian personnel ceilings enacted by Congress. Section 806(a)(2)(A) required the Department of Defense not to contract out work unless a cost comparison between federal civilian and contractor workforces was conducted in which the estimate of the cost of performance by the government was based upon the most efficient and cost effective organization. This subsection additionally required the Secretary of Defense to certify to Congress that the in-house workforce estimate was so organized.

Named as defendants were the Secretaries of Defense and of the Army, the Commanding General of the United States Army Training and Doctrine Command, the Commander of the U. S. Army Operations at Fort Gordon, and the contracting officer. Each defendant was sued in his official capacity. Pan American World Airways, Inc. was later permitted by the District Court to intervene as defendant.

The District Court, in an opinion issued from the bench, dismissed the action solely on its perception that the District Court lacked jurisdiction and the plaintiffs lacked standing.[7] The lower court's ruling was affirmed by the

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[6] See Pet. App. D at 22a.

[7] *AFGE Local 2017 v. Brown*, No. CV 180-136 (S.D.Ga., August 29, 1980); Pet. App. B and C at 10a-11a.

United States Court of Appeals for the Eleventh Circuit.[8] The sole basis for the court's affirmance was that the agency action was committed to agency discretion by law within the meaning of 5 U.S.C. § 701(a)(2) (1976). In reaching this conclusion, the court relied upon the three criteria set forth in *Bullard v. Webster*[9] for determining whether agency action is committed to agency discretion by law.

REASONS FOR GRANTING THE PETITION

In affirming the district court holding that the lower court lacked jurisdiction over the union's action, the court of appeals applied 5 U.S.C. § 701(a)(2) in a manner which conflicts in principle with the Supreme Court's interpretation of the same subsection in *Citizens to Preserve Overton Park v. Volpe*.[10] Further, the extent to which employees of the United States can seek judicial review of decisions to contract out their work is an important issue of law which should be settled by this Court.

The Administrative Procedure Act provisions on judicial review of agency action[11] are applicable subject to 5 U.S.C. § 701(a) (1976). Pertinent to this case is 5 U.S.C. § 701(a)(2) (1976) which states:

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> • • •
>
> (2) agency action is committee to agency discretion by law.

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[8] *AFGE Local 2017 v. Brown*, 680 F.2d 722 (11th Cir. 1982); Pet. App. at 1a (hereinafter referred to as *AFGE Local 2017 v. Brown*).

[9] 623 F.2d 1042 (5th Cir. 1980), cert. denied, 451 U.S. 907 (1981).

[10] 401 U.S. 402 (1971).

[11] 5 U.S.C. §§ 701-706 (1976).

In interpreting this subsection of the Administrative Procedure Act, this Court held in *Citizens to Preserve Overton Park* that the subsection is "only applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" [12] This Court then proceeded to hold that since the statute at issue expressly provided for the standards to guide the agency's discretion, there was law to apply.[13] Similarly, subsequent courts have looked to the standards in the statutes at issue in order to ascertain whether review is precluded by § 701(a)(2).[14] Such a reading is fully consistent with the introductory language to § 701(a)(2) in that review is only precluded "*to the extent that* agency action is committed to agency discretion by law." By its very terms, a statutory standard restricts the breadth of agency discretion.

Instead of focusing on the standards set forth in Pub. Law 96-107, § 806(a)(1)-(2)(A), the court of appeals applied a different test to determine whether § 701(a)(2) precluded review. According to the court of appeals, it is "an analysis of the nature of the agency decision involved" [15] rather than the statutory standard which is determinative. The court of appeals then relied upon criteria set forth in *Bullard v. Webster*. *Bullard* itself indicates that review is precluded under § 701(a)(2) "when an evaluation of the legislative scheme *as well as the practical and policy implications demonstrate that re-*

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[12] *Citizens to Preserve Overton Park*, 401 U.S. at 410, citing S.Rep. No. 752, 79th Cong., 1st Sess. 26 (1945).

[13] 401 U.S. at 411-12.

[14] E.g., *WWHT, Inc. v. Federal Communications Commission*, 656 F.2d 807, 815 (D.C.Cir. 1981); *Merrill Ditch-Liners, Inc. v. Pablo*, 670 F.2d 139, 140 (9th Cir. 1982); *Jaymar-Ruby, Inc. v. Federal Trade Commission*, 651 F.2d 506, 511 (7th Cir. 1981); *Olegario v. United States*, 629 F.2d 204, 224 (2nd Cir. 1980), cert. denied, 450 U.S. 980 (1981).

[15] 680 F.2d at 725; Pet. App. A at 6a.

view should not be allowed." [16] The three criteria stated in *Bullard* as useful for making such a determination are (1) the broad discretion given an agency in a particular area of operation; (2) the extent to which the challenged action is the product of political, economic or managerial choices that inherently are not subject to judicial review; and (3) the extent to which the challenged agency action is based on some special knowledge or expertise.[17]

As is readily apparent, the *Bullard* criteria are much more expansive than merely whether a statutory standard exists under which the agency action can be measured. Under the first criteria (breadth of discretion), at least as applied by the Court of Appeals for the Eleventh Circuit,[18] an agency action is not only measured

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[16] 623 F.2d 1042 (5th Cir. 1980), cert. denied, 451 U.S. 907 (1981). The United States Court of Appeals for the Eleventh Circuit, established October 1, 1981 pursuant to the Fifth Circuit Court of Appeals Reorganization Act of 1980, P.L. 96-452, 94 Stat. 1994, uses the decisions of the former United States Court of Appeals for the Fifth Circuit, as it existed on and before September 30, 1981, as precedent. *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206, 1207 (11th Cir. 1981).

[17] *Bullard*, 623 F.2d at 1046, as cited in *AFGE Local 2017 v. Brown*, 680 F.2d at 725-726; Pet. App. A at 6a. The criteria stated in *Bullard* were in turn taken from *Local 2855, AFGE v. United States*, 602 F.2d 574, 578-580 (3rd Cir. 1979). Yet even the court in *Local 2855, AFGE* recognized that agency action is reviewable where the agency decision violated statutory command. 602 F.2d at 580. This recognition is conspicuously absent in *AFGE Local 2017 v. Brown*.

[18] In *AFGE Local 2017 v. Brown*, the Court of Appeals held that Section 806 failed to provide guidelines beyond the statutory standards. 680 F.2d at 726; Pet. App. at 7a. The Court of Appeals placed reliance upon court cases decided under Office of Management and Budget (OMB) Circular No. A-76, 44 Fed.Reg. 20, 556 (1979), revised 45 Fed.Reg. 69,322 (1980). OMB Circular A-76 establishes the policy of the federal government to conduct a cost analysis comparing the costs to the United States of performing a government function by federal employees with the costs of performing the same function by a private contractor. In short, agencies are to

by whether a standard exists under the statute restricting discretion, but by the range of discretion within the statute. What the court of appeals failed to recognize is that the amount of discretion goes not to whether agency action is reviewable, but to the amount of discretion a court will give to the agency.[19]

The second and third *Bullard* criteria are similarly not germane to the analysis of agency action in light of the statutory standards of Section 806. The second criterion (i.e., the extent to which the challenged action is the product of political, economic or managerial choices that are inherently not subject to judicial review) ignores the role of Congress in establishing judicial review of statutory causes of action. If, as this Court has stated, agency action is commited to agency discretion by law under § 701(a)(2) only where statutes are drawn in such broad terms that there is "no law to apply,"[20] then it is Congress' determination as to when a matter is immune from judicial review. Congress makes this determination

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follow guidance under OMB Circular A-76 to decide whether or not to contract out work. The Court of Appeals asserted that the cases it cited stood for the proposition that decisions under OMB Circular A-76 are committed to agency discretion. 680 Pet. App. at 7a-8a.

In relying upon the OMB Circular A-76 cases as controlling, the Court of Appeals made two fundamental errors. OMB Circular A-76 mandated neither retention nor contracting out of work based upon results of the cost comparison. *Local 2855, AFGE v. United States*, 602 F.2d 574, 581 (3rd Cir. 1979); *AFGE v. Hoffman*, 427 F.Supp. 1048, 1071 (N.D.Ala. 1976). By contrast, Section 806 *forbids* contracting-out where done to circumvent personnel ceilings or where based on an inflated estimate of the in-house cost. Secondly, as OMB Circular A-76 was not a law, rule or regulation having force of law, there was no law to apply. *Local 2855, AFGE, supra*, at 582, n.28; *AFGE Local 1872 v. Stetson*, 86 Lab.Cas. (CCH) ¶ 33,819 at 48, 851 (D.D.C. 1979). Section 806 by virtue of being federal statute, has the force of law.

[19] See 5 U.S.C. § 706(2)(A) (1976).

[20] See note 12, *supra*.

by legislating the standards that guide agency action.[21] The third *Bullard* criterion (i.e., the extent to which the challenged agency action is based on same special knowledge or expertise) is a matter more appropriately addressed to the amount of deference given to the agency when its action is reviewed.[22] The fact that Congress has legislated standards assumes that agency expertise is not so controlling that the courts must refrain from insuring compliance with the standard.[23] In short, it is in those situations where Congress fails to provide a standard by which agency action may be judged that determines when agency action is immunized from judicial review under § 701(a)(2). Because the *Bullard* criteria applied in the instant case do not approach the issue of reviewability in terms of the statutory language, the basis of the court of appeals decision cannot stand.[24]

Had the court of appeals made the proper inquiry under § 701(a)(2), it would have found that the standards of Section 806 created "law to apply" for jurisdictional purposes. Section 806(a) begins by stating that "*no* commercial or industrial type *function* of the Department of Defense . . . performed by Department of Defense personnel may be converted to performance by a private contractor."[25] As Section 806(a) says "no" function "may be converted" the preliminary language

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[21] See note 13, *supra*.

[22] See 5 U.S.C. § 706 (1976).

[23] Indeed, Section 806(a)(1), which prohibits conversion to performance by a private contractor to circumvent personnel ceilings requires an inquiry into agency motivation rather than any cost comparison expertise.

[24] By this statement, petitioners do not concede that the conversion of work performed by Department of Defense civilian personnel to work performed by a private contractor is immune from review even under *Bullard* criteria.

[25] Emphasis added.

is a mandatory prohibition on the circumstances outlined in (1) and (2).

Accordingly, under Section 806(a)(1), no function may be converted "to circumvent any civilian personnel ceiling." This language is absolute without qualification. Section 806(a)(1) unequivocally prohibits converting to contractor performance to circumvent personnel ceilings.[26] Thus, there is a definite guideline so that contracting to circumvent personnel ceilings within the Department of Defense is not committed to agency discretion by law.

Similarly, Section 806(a)(2)(A) requires absolute action by the Secretary of Defense. Under Section 806(a)(2)(A), no conversion to a private contractor may take place unless the *Secretary* certifies that the government in-house cost calculation *is* based on an estimate of the *most* efficient and cost effective organization for in-house performance. Congressman Hanley, sponsor of the eventual Section 806, described (a)(2)(A) in the following terms:

> Second, my amendment *requires* the Secretary to review the function which is to be studied for contracting out *to insure* that the function *is organized* and staffed in the *most* efficient and cost effective manner. The Secretary is *required* to then *certify* that the function *is so organized* and *staffed* before studying the desirability of contracting out the function. Thus, in-house cost estimates developed in the study *will be based* on the *most cost effective and efficient organization* the agency can provide so that *comparisons* with contractor costs *will provide a true*

[26] Personnel ceilings refer to the number of civilian personnel which may be employed by the Department of Defense. Congress authorizes the total number of civilian workers throughout the Department. See e.g., Department of Defense Authorization Act, 1980, Pub.L. No. 96-107, § 501(a), 93 Stat. 803, 809 (1979); Department of Defense Authorization Act, 1982, Pub.L. No. 97-86, § 601(a), 95 Stat. 1099, 1109 (1981). Performance of Department of Defense work by a private contractor enables the Department of Defense to hire other personnel to staff other positions while staying under the personnel ceiling.

> *basis* for determining if taxpayer money can best be saved by contracting out.[27]

Congressman Hanley's description of Section 806(a)(2)(A) illustrates the absolute requirements placed on the Department of Defense. The secretary must study the function to "insure" that the function "is" organized and staffed in the "most" efficient and cost effective manner and "certifiy" this organization to the Congress so that cost comparisons "will be based" on the "most" efficient organization for in-house performance. The resulting cost comparisons "will provide a true basis" for determining if the work can be done cheaper by in-house personnel. The section thereby mandates the "*most*" efficient and cost-effective organization. The Secretary of Defense and his designees may not disregard this mandate. On this basis, there is law to apply in that contracting may not be based on anything less than the most cost efficient and effective organization possible.

An analysis of the Section 806 statutory language therefore leads to the inevitable conclusion that Congress has established mandates with which the Department of Defense must comply. Had the court of appeals analyzed "the law to apply" rather than imposing the *Bullard* criteria, it could only have held that review was not precluded by § 701(a)(2).

In addition to resolving the conflict between the court of appeals decision here and *Citizens to Preserve Overton Park*, a further reason for this Court to grant this petition lies in the fundamental importance of resolving whether civilian employees of the Department of Defense may seek judicial review of agency decisions to contract out their work. Although Section 806 is no longer in effect,[28] substantively exact language to Section 806 has

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[27] 125 Cong.Rec. H7912 (daily ed. September 14, 1979) (statement of Rep. Hanley) (emphasis added).

[28] By its terms, Section 806(a) was only in effect during fiscal year 1980.

continued to the present under Section 502(a) of the Department of Defense Authorization Act, 1981.[29] Deter-

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[29] Pub.L. No. 96-342, § 502(a), 94 Stat. 1077, 1086 (1980). The full test of Section 502(a) is as follows:

> No commercial or industrial type function of the Department of Defense that on October 1, 1980, is being performed by Department of Defense personnel may be converted to performance by a private contractor—
>
> (1) to circumvent any civilian ceiling; or
>
> (2) unless the Secretary of Defense provides to the Congress in a timely manner—
>
> (A) notification of any decision to study such commercial or industrial type function for possible performance by a private contractor;
>
> (B) a detailed summary of a comparison of the cost of performance of such function by Department of Defense personnel and by private contractor which demonstrates that the performance of such function by a private contractor will result in a cost savings to the Government over the life of the contract and a certification that the entire cost comparison is available;
>
> (C) a certification that the Government calculation for the cost of performance of such function by Department of Defense personnel is based on an estimate of the most efficient and cost effective organization for performance of such function by Department of Defense personnel; and
>
> (D) a report, to be submitted with the certification required by subparagraph (C), showing—
>
> (i) the potential economic effect on employees affected, and the potential economic effect on the local community and Federal Government if more than 50 employees are involved, of contracting for performance of such function;
>
> (ii) the effect of contracting for performance of such function on the military mission of such function; and
>
> (iii) the amount of the bid accepted for the performance of such function by the private con-

mination of the issue before this Court would provide crucial guidance as to the rights of thousands of Department of Defense civilian workers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 12, 1982

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tractor whose bid is accepted and the cost of performance of such function by Department of Defense personnel, together with costs and expenditures which the Government will incur because of the contract.

This current provision may also be found at 10 U.S.C. § 2304 note (Supp. IV 1980).

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Appendix B—Order of the United States District Court for the Southern District of Georgia, Augusta Division in *American Federation of Government Employees, Local 2017, et al., v. Harold Brown, Clifford Alexander, et al., and Pan American Airways, Inc.*, Civil Action No. CV180-136, Dated August 29, 1980 ..... 10a

Appendix C—Transcript of Hearing before Hon. Dudley H. Bowen, Jr., District Judge, United States District Court for the Southern District of Georgia, August 29, 1980, in *American Federation of Government Employees, Local 2017, et al., v. Harold Brown, Clifford Alexander, et al., and Pan American World Airways, Inc.*, Civil Action No. CV180-136 ..... 11a

Appendix D—Verified Complaint For Temporary Restraining Order, Temporary Injunction, and Permanent Injunctive Relief Filed in the United States District Court for the Southern District of Georgia, Augusta Division, in *American Federation of Government Employees, Local 2017 v. Harold Brown, Clifford Alexander, et al., and Pan American World Airways, Inc.*, Filed August 20, 1980 ..... 22a

APPENDIX A

No. 80-7676

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

AMERICAN FEDERATION of GOVERNMENT EMPLOYEES, LOCAL 2017, *et al.*,
Plaintiffs-Appellants,

v.

HAROLD BROWN, CLIFFORD ALEXANDER, JR., *et al.*,
Defendants-Appellees,

PAN AMERICAN WORLD AIRWAYS, INC.,
Intervenor-Appellee.

July 12, 1982

Appeal from the United States District Court
for the Southern District of Georgia

Before MORGAN, HILL and KRAVITCH, Circuit Judges.

JAMES C. HILL, Circuit Judge:

The appellants, Local 2017 of the American Federation of Government Employees [1] and three former civilian employees of the Department of the Army at Fort Gordon, Georgia, filed a complaint in the United States District Court for the Southern District of Georgia, seeking temporary and permanent injunctive relief enjoining the United States Army from contracting out certain work performed by civilian employees at Fort Gordon.[2] The

[1] Local 2017 is a labor organization represening certain employees of the Department of the Army at Fort Gordon.

[2] The Secretaries of Defense and the Army, the Commanding General of the United States Army Training and Doctrine Com-

complaint alleged *inter alia* that the defendants' decisions to contract out the work to Pan American World Airways (hereinafter Pan Am) violated sections 806(a)(1) and 806(a)(2)(A) of the Department of Defense Authorization Act, 1980. Pub.L.No.96-107, 93 Stat. 803 (1979), 10 U.S.C. § 2304 note (Supp. III 1979). The Disttrict Court dismissed the complaint on the basis that the court lacked jurisdiction, and that the appellants lacked standing to sue. For the reasons stated below we affirm the decision of the District Court.

I

The general policy of the federal government is to rely on competitive private enterprise to supply the products and services it needs except when comparative cost analysis indicates that procurement from a private source is not as cost-effective as in-house performance.[3] This policy is explicitly set forth in Office of Management and Budget (OMB) Circular No. A-76, 44 Fed. Reg. 20, 556 (1979), *revised*, 45 Fed.Reg. 69,322 (1980).[4] OMB Circular No.

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mand, the Commander of the U.S. Army Operations at Fort Gordon, and a contracting officer were each named defendants in their official capacities. Pan American World Airways, Inc., the awardee of a contract to perform the work in question was granted permission by the court to intervene in the action as a defendant.

[3] In-house performance is also allowed when national defense needs require it; contract performance would cause unacceptable delay or disruption of an essential program; or no satisfactory private source exists that is capable of providing the required product or service.

[4] The government's policy of acquiring needed products and services from private sources was first expressed in Bureau of Budget Bulletins issued in 1955, 1957 and 1960. In 1966 Circular No. A-76 was issued and for the first time, prescribed the policy and implementing guidelines in a permanent directive. The Circular in effect at the time the present case arose was issued March 29, 1979. This circular is not materially different from the current version issued September 26, 1980.

A-76 also provides guidelines for the implementation of the policy.

In 1979 Congress enacted the Department of Defense Authorization Act, 1980. Pub.L.No.96-107, 93 Stat. 803 (1979), 10 U.S.C. § 2304 note (Supp. III 1979).[5] Section 806(a) of the Act addressed the matter of the Department of Defense converting from in-house performance of commercial and industrial functions to performance of these functions by private contractor. Section 806(a) had the effect of elevating certain aspects of Circular A-76 to the status of law. Specifically, this provision stated that no functions being performed by Department of Defense personnel could be converted to performance by a private contractor: (1) to circumvent any civilian personnel ceiling: (2) without prior notification to Congress of the decision to study the function for possible conversion; and (3) without certification to Congress of the in-house cost calculation.[6]

The present case arose from the decision by the Department of the Army to contract out certain functions

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[5] This Act was an appropriations statute for fiscal year 1980 only. It thus has no present force or effect.

[6] Section 806(a) read:

> (a) During fiscal year 1980, no commercial or industrial type function of the Department of Defense that on the date of the enactment of this Act is being performed by Department of Defense personnel may be converted to performance by a private contractor—
>
> (1) to circumvent any civilian personnel ceiling, and
>
> (2) unless the Secretary of Defense shall provide to the Congress in a timely manner—
>
> (a) notification of any decision to study such commercial or industrial type function for possible performance by a private contractor, together with a certification that the government in-house cost calculation for the function is based on an estimate of the most efficient and cost effective organization for in-house performance.

performed by the Directorate of Industrial Operations and Housing at Fort Gordon, Georgia. These functions included housing, maintenance, supply and service, and transportation. Prior to making the contracting out decision the Army conducted an analysis of the functions to determine whether a cost savings could in fact be achieved by conversion to a private contractor. As a part of this analysis the Army first performed a study to determine the most efficient and cost-effective organization for in-house performance of these functions. The Army then solicited and received cost proposals from private contractors for the performance of the functions. The cost proposal offered by Pan Am was determined to be the lowest of all the contractors. The Army compared Pan Am's cost proposal with the cost calculation for in-house performance and determined that an estimated 58-month savings of approximately $32 million could be achieved by contracting with Pan Am for the performance of the functions.

The results of the Army's study were reported to Congress, including a certification that the Army's in-house cost calculation for the functions was based on an estimate of the most efficient and cost-effective organization for in-house performance. The Army's tentative decision to contract out to Pan Am was also reported to Congress. Congress raised no objections to the in-house cost caculations or to the decision to contract out.

The Army, consequently, awarded the contract to Pan Am. On the same day that the contract was awarded reduction-in-force notices were sent to 618 civilian employees at Fort Gordon whose positions would be eliminated because of the contract.[7] The appellants then

[7] As was required under the contract Pan Am offered all displaced civilian employees the right of first refusal for employment openings under its contract in positions for which they were qualified. Each of the individual plaintiffs in this action was offered a position with Pan Am.

brought this action to enjoin the Army from proceeding with the conversion to Pan Am.

The appellant's complaint alleged that the conversion violated Public Law 96-107, Section 806(a) because it was done to circumvent civilian personnel ceilings, and because the Army's in-house cost calculations failed to provide a proper estimate of the most efficient and cost-effective organization for in-house performance.

The District Court did not consider the complaint on the merits, but rather held a hearing on the threshold issues of jurisdiction and standing. The court concluded that it was without jurisdiction because the Army's conversion decision was not subject to judicial review. The court further concluded that the plaintiffs lacked standing because they were not within the zone of interests protected by Section 806. Upon the dismissal of the plaintiff's complaint this appeal was taken.

III

The two issues before us on appeal are first, whether district courts have judicial review over alleged violations of Section 806(a) and second, whether affected civilian employees and their labor organization have standing under Section 806(a) to challenge a decision of the Department of the Army to convert from in-house performance of certain base functions to performance by private contractor.

The appellants argue that pursuant to the Administrative Procedure Act (APA)[8] judicial review of the Army's decision is available. They contend that Public Law 96-107 evinces no statutory preclusion of judicial review, and furthermore, that the Army's contracting decision is not committed to agency discretion by law.

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[8] 5 U.S.C. §§ 701-706 (1976).

There is no question that the APA affords judicial review of agency action to any person adversely affected or aggrieved by an agency action[9] except to the extent that, (1) statutes preclude judicial review, or (2) agency action is committed to agency discretion by law.[10] Public Law 96-107 contains no explicit preclusion of judicial review such that the first exception is clearly inapplicable to the present case.[11] Whether the second exception applies depends upon an analysis of the nature of the agency decision involved. As we stated in *Bullard v. Webster*, 623 F.2d 1042 (5th Cir. 1980):

> In the absence of a statute that explicitly precludes judicial review, an agency action is committed to the agency's discretion and is not reviewable when an evaluation of the legislative scheme as well as the practical and policy implications demonstrate that review should not be allowed.

623 F.2d at 1046. In *Bullard* we indicated three criteria useful in making a determination of whether an action is committed to agency discretion: (1) the broad discretion given an agency in a particular area of operation, (2) the extent to which the challenged action is the product of political, economic or managerial choices that are inherently not subject to judicial review, and (3) the extent to which the challenged agency action is based on some special knowledge or expertise.[12] *Id.* The ap-

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[9] 5 U.S.C. § 702 (1976).

[10] 5 U.S.C. § 701(a) (1976).

[11] In *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967) the Supreme Court noted that "the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation . . ." and that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."

[12] These three criteria were taken from the Third Circuit's opinion in *Local 2855, AFGE v. United States*, 602 F.2d 574 (3d Cir. 1979). *Local 2855* essentially raised the same issue as the present case. The court held that the Army's contracting out decision was committed to agency discretion and thus not subject to judicial review.

plication of these criteria to the case at hand convinces us that the decision to contract out was indeed committed to the discretion of the Army and is thus not subject to judicial review.

We agree with the finding of the District Court that Section 806 vests the Army with broad discretion to make contracting out decisions and provides no legal standard for the court to apply. As the District Court stated:

> Section 806 is a statement policy and legislative intent. It is a mandate from the legislative branch to the executive branch, but it is not replete with formulae or discernable (sic) guidelines against which the agency decision may be measured.

AFGE, Local 2017 v. Brown, No. CV 180-136 at 12 (S.D. Ga. August 29, 1980).

There is no dispute that in enacting Section 806 Congress sought to elevate some aspects of existing practice and procedure under OMB Circular A-76 to the status of law.[13] Section 806 in no way affected the nature of the conversion decision and imposed no new standards to guide the military's discretion. Except for the requirements of congressional notification and reporting, there were no restrictions on conversions in Section 806 that are not in OMB Circular A-76. Indeed, the OMB Circular is far more detailed and offers far more by way of guidelines for decisions than does Section 806. Thus, a number of cases concerning Army conversion decisions made pursuant to OMB Circular A-76 are extremely persuasive. All of the courts which have considered the issue have held that conversion decisions made by the Department of Defense officials under Circular A-76 are committed to agency discretion and are not subject to judicial review. *Local 2855, AFGE v. United States*, 602 F.2d

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[13] Our review of the legislative history convinces us that the overriding concern of Congress was to provide for increased congressional review and oversight of conversion decisions.

574 (3d Cir. 1979); *American Federation of Government Employees v. Stetson*, C.A. No. 77-2146 (D.D.C. July 25, 1979); *American Federation of Government Employees v. Hoffmann*, 427 F.Supp. 1048, 1082-84 (N.D.Ala.1976); and *AFGE, Local 1688 v. Dunn*, No. A-75-156 (D.Alaska Sept. 30, 1975), *aff'd on other grounds*, 561 F.2d 1310 (9th Cir. 1977).

In *Local 2855, AFGE*, the Third Circuit observed that pursuant to *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410, 91 St.Ct. 814, 820, (1971) the committed to agency discretion exception to judicial review is intended to be "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' [citation omitted]." 602 F.2d at 578-79. In applying this rule to OMB Circular A-76 the court concluded that the circular failed "to provide meaningful criteria against which a court may analyze the Army's decision." *Id.* In a similar vein the District Court in the case at hand concluded correctly that because Section 806 lacked discernible guidelines "a District Judge would have no law to apply in determining whether or not a decision made by the agency was correct." *AFGE, Local 2017* at 11-12.

The Army's contracting out decision is also an inappropriate subject for judicial review because the decision involves military and managerial choices inherently unsuitable for the judiciary to consider. As the Supreme Court noted in *Orloff v. Willoughby*, 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed 842 (1954) "[j]udges are not in the business of running the Army . . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters." 345 U.S. at 93-4, 73 St. Ct. at 540.[14]

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[14] We expressed similar sentiments in *Mindes v. Seaman*, 453 F.2d 197, 199 (5th Cir. 1971) when he stated:

> Traditional judicial trepidation over interfering with the military establishment has been strongly manifested in an

In addition, the contracting out decision is based on the special expertise of the Army officials involved. Calculations of the most efficient and cost-effective way to perform a function at a military installation "are matters on which experts may disagree; they involve nice issues of judgment and choice." *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 78 SCt. 752, 2 L.Ed.2d 788 (1958). These issues are best resolved by the Army analysts rather than by the courts since, in the words of Justice Frankfurter, they "do not present questions of an essentially legal nature in the sense that legal education and lawyers' learning afford peculiar competence for their adjustment." *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104, 122, 59 S.Ct. 715, 724 (1939) (Frankfurter, J. concurring).[15]

The appellants argue further that the District Court erred in holding that they lacked standing to challenge the Army's contracting out decision. In view of our determination that the District Court was correct in finding that it lacked jurisdiction it is unnecessary to address the question of standing.

III

The judgment of the District Court is

AFFIRMED.

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unwillingness to second-guess judgments requiring military expertise and in a reluctance to substitute court orders for discretionary military decisions . . . . [T]he greatest reluctance to accord judicial review has stemmed from the proper concern that such review might stultify the military in the performance of its vital mission.

[15] We should also note that if a contracting out decision is in fact made on the basis of an erroneous calculation of the cost of in-house performance, or to circumvent civilian personnel ceilings, affected civilian employees and their labor representative are always free to bring such discrepancies to the attention of Congress and to seek legislative relief.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION

Civil Action No. CV180-136

AMERICAN FEDERATION of GOVERNMENT EMPLOYEES, LOCAL 2017, JOHN C. CUMMINGS, STERLING DUNN, and JOHN E. GUILLEBEAU,
Plaintiffs,

v.

HAROLD BROWN, CLIFFORD ALEXANDER, JR., WILLIAM J. HILSMAN, WALTER L. MORRIS, JR. and DONN A. STARRY,
Defendants,

PAN AMERICAN WORLD AIRWAYS, INC.,
Defendant-Intervenor.

ORDER

Upon the findings, conclusions, and considerations expressed in open Court and upon the record in this case,

It appearing that the Court is without jurisdiction to consider the plaintiffs' complaint and that the plaintiffs have no standing to sue,

It is hereby ORDERED that the plaintiffs' application for preliminary injunctive relief is denied and the complaint dismissed.

Order entered at Augusta, Georgia, this 29th day of August, 1980.

/s/ Dudley H. Bowen, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

Civil Action File No. CV180-136

AMERICAN FEDERATION of GOVERNMENT EMPLOYEES, LOCAL 2017, JOHN C. CUMMINGS, STERLING DUNN, and JOHN E. GUILLEBEAU,
Plaintiffs,

vs.

HAROLD BROWN, CLIFFORD ALEXANDER, JR., WILLIAM J. HILSMAN, WALTER J. MORRIS, JR., and DONN A. STARRY,
Defendants,

and

PAN AMERICAN WORLD AIRWAYS, INC.,
Defendant-Intervenor.

Before:

Honorable DUDLEY H. BOWEN, JR.,
District Judge

Augusta, Georgia
August 29, 1980—12:25 p.m.

APPEARANCES OF COUNSEL:

On behalf of the Plaintiffs:

TERRANCE P. LEIDEN, Esq.
DAVID GRILL, Esq.

On behalf of the Defendants:

EDMUND A. BOOTH, JR., Esq.

On behalf of the Defendant-Intervenor:

DAVID E. HUDSON, Esq.

THE COURT: This is a follow-up session from our Wednesday afternoon hearing. I told you that I would have a decision by 8:00 o'clock last night, but that was an impractical commitment. We didn't get through with our jury until 6:00 o'clock.

I have prepared some notes, and I will follow those notes and announce to those present my decision with respect to the case and particular with respect to the application for preliminary injunctive relief, and I will, of course, as I mentioned in these notes, I will enter a supplemental written memorandum opinion as soon as time permits.

On August 21st, 1980, the Plaintiffs filed a complaint seeking declaratory and injunctive relief against the Defendants. The Plaintiffs seek to enjoin preliminary and permanently the implementation of a proposed contracting of industrial and commercial service at Fort Gordon, Georgia, to Pan American Airways, Inc. Pan American has been determined by an agency appeal to be the best bidder for the services the Army seeks to contract out. Pan American has been allowed to intervene as a party in this case.

This order is necessarily brief because of the severe time requirements implied by the needs of the parties in this litigation. A supplemental written memorandum opinion will be entered. Because the timeliness of the Plaintiffs' action is an issue in this case for equitable relief, a statement of some of the undisputed facts showing the chronology of the developments leading to the case is important.

On December 15th, 1978, the Army released a request for proposed solicitation of bids for the commercial and industrial functions which were let to a private contractor at Fort Gordon. On November 9th, 1979, the Congress of the United States passed Public Law 96-107, which is Section 806(a) and (b) as part of the Department of Defense Authorization Act for fiscal year 1980. Pursuant to the mandates contained in Section 806, the Secre-

tary of the Army transmitted to the Congress the reports and notification required there in. Congress has not chosen to take any legislative action on the reports, and it appears that no committee of either House of Congress has conducted any extensive hearings thereon, and no individual member of Congress has objected. Because the proposed contracting of services originated in calendar year 1978 and the contract was not finally awarded to Pan Am until June 26th, 1980, no specific appropriation for this element of the budget of the Department of Defense has been included in any budgetary legislation.

The award of the contract to Pan American Airways was publicized locally, and the decision to award underwent an extensive review or appeal process. At least one of the Plaintiffs, Local 2017, stated publicly an intention to seek court action to halt the contracting process in July 1980. The complaint was not actually filed until August 21st. The Court conducted a hearing on the Plaintiffs' application for preliminary injunction on August 27th, 1980. No evidence was educed at the hearing because of the concern expressed by the Court regarding the threshold legal questions relating to jurisdiction, standing to sue, timeliness, legislative intent, and the observance of the constitutional separation of powers in the Federal system.

The date for implementation of the contractor's services, alerady once delayed by agreement during the appeals process, is September 1st, 1980. It is represented to the Court that the contract documents provide for a one million dollar penalty of like payment to Pan American in the event that the contractor's services do not begin on that date. The "phasing in" process started at Fort Gordon, Georgia, on July 1st, 1980, and Pan American entered into several subcontracts.

There are three individual Plaintiffs. The other Plaintiff is a local labor union of the American Federation of Government Employees. The membership of the union among the Fort Gordon employees is represented to the court at approximately 600 persons.

Exact figures are unavailable because there is no evidence to support them, but for the purpose of this order, it is assumed as follows: On September 1st, the contractor will undertake to perform many commercial and industrial services at Fort Gordon, Georgia, which were previously performed by Department of Defense civilian personnel. A large number of former Department of Defense civilian employees will be employed by the contractor; a significant number of Department of Defense civilian employees will be "laid off" pursuant to reduction in force notices sent on the 25th day of August. It should also be noted that the latter employees have received a tentative notice in reduction of force on June 26th, 1980.

With all of this in mind, it is, of course, appropriate to examine the statute, Section 806 of Public Law 96-107, which has become a focal point in this case. I will not quote the statute, but generally, it provides for the prohibition on conversion to private contractors of industrial and commercial functions previously performed by the Department of Defense to circumvent any civilian personnel ceilings, unless the Secretary of Defense shall provide to Congress in a timely manner notification of the proposed event and in certain cases, with regard to that event, a very extensive report to Congress on the potential economic and military mission effect and other effects that the proposal will have. This legislation provides to the executive branch an unmistakable prohibition from the legislative branch on the conversion of functions to private contractors in the absence of certain conditions. It is easily seen that no conversion may be made to circumvent civilian personnel ceilings established by Congress. It is equally clear that any conversion must not be made without prior notification, certification and extensive "effect" reports to Congress.

This is one of those cases in which the Court must carefully examine the intent of Congress and try as best it can to determine the intent that the legislature had in passing this legislation.

As contained in the report of the House Committee on armed services, House Report No. 96-106, the Committee and Congress were concerned "over the efficacy of conversions to performance by private contractors in some functions, and evidence that in many instances, the administration of civilian personnel ceilings is making conversion to private contracts, the only feasible method of getting the job done. Thus, the Committee included a provision that would require the Department of Defense to provide the Congress with more information and permit the Congress time to review decisions to contract out." That quote is lifted from page 136 of House Report 96-166. The District Courts, in determining legislative intent, may look to the reports of committees concerned with legislation to the Congress as a whole. Also, District Courts may look to the Congressional record of statements made from the floor of Congress, or in debate to define the intent of that body.

It appears that the salient features of Section 806 were contained in an amendment to legislation offered by Congressman Hanley to the House of Representatives on September 14th, 1979, that appears in the Congressional record of the House on September 14th, 1979, at page H-7912. While offering the amendment, Congressman Hanley stated, "I think we can all agree that decisions to contract out should be based on factors related to saving taxpayer money, factors such as cost and efficiency, rather than on the need to circumvent a personnel ceiling." After stating on page H-7913 that the former OMB Circular A-76 had been expanded and revised, Congressman Hanley stated, "I firmly believe that the cornerstone of the Federal Government's procurement policy should be cost effectiveness once certain mitigating factors have been considered."

Supporting Congressman Hanley's amendment, Congressman Kazen of Texas stated, "I therefore think that the Congress should have the final say as is provided for in this bill as to whether or not a particular category of work should be contracted out." To this, Congressman

Hanley replied, "Mr. Chairman, I am most appreciative of the gentleman's comments, and I thank him for his support. He puts the case very well."

The only significant change which the bill underwent after Congressman Hanley's amendment is the deletion of a 30-day legislative review period to which the House and Senate conferees agreed.

Moreover, a plain English and common sense reading of the words of the statute indicates the intent of Congress in its passage.

The intent of Congress in passing this legislation was to increase the efficiency and reduce the cost of military operations, to prevent the circumvention of civilian personnel ceilings, to require the Department of Defense to report to Congress in detail any proprosed conversions from the military to the private sector of commercial and industrial functions, and to retain the "final say as to whether or not a particular category of work should be contracted out."

I can discern no legislative intent to submit questions relating to economic effect on employees, economic effect on communities, practical effect on military mission, budgetary considerations, or broad monetary policy in the contracting of commercial and industrial military functions to the District Courts of the United States.

The intent of the Congress regarding restriction on conversion of commercial and industrial type functions from Department of Defense personnel to private contractors may also be gleaned from the Department of Defense Authorization Act for fiscal year 1981. Section 502 of the act is entitled "Strengthening of Restrictions on Conversions of Performance of Commercial and Industrial Type Functions from Department of Defense Personnel to Private Contractors." The title indicates a legislative objective to provide more strengent Congressional controls on contracting out than provided in Section 806 of Public Law 96-107.

Of particular significance to this case is that in enacting Section 502 of the 1981 Authorization, which Con-

gress characterized as stronger than Section 806 of the 1980 Authorization Act, the legislature specifically deleted a provision allowing a Government employee who receives a "reduction in force notice" as a result of a conversion to file suit in the United States District Court. Thus, I have deduced that Congress intended no right of action for Government employees under Section 806 of Public Law 96-107 or the subsequent act of similar import of fiscal year 1981.

Now, to examine the jurisdiction of the Court, I have observed that the absence of any legislative intent to submit such questions for judicial review is entirely consistent with the failure of Congress to specifically provide for jurisdiction over such matters in the Courts. The Courts of the United States are empowered to hear and determine only such cases in which jurisdiction is granted by statute. Here there is no such grant.

The Constitution of the United States and certain applicable statutes provide that the Courts of the United States shall have certain specified jurisdiction in certain cases or controversies which involve justicable issues. Intertwined with the consideration of whether or not a justiciable issue or "case or controversy" exists is a consideration of the constitutional separation of powers in our Federal system. At the very roots of this system is the concept that the Courts will not interfere with questions which are strictly political, legislative or executive in nature. The Congress of the United States establishes the broad policies of the country by law.

The only conceivable inactment which would provide for judicial review of a decision to contract services would be through the Administrative Procedures Act, but the grant of jurisdiction in the Administrative Procedures Act is not broad enough to encompass a judicial review of a decision made by the Department of Defense, reported to Congress under Section 806, upon which the Congress has made no negative response to Committee action, resolution, or legislation.

Judicial review of such agency decisions has been questioned in other litigation.

The Third Circuit Court of Appeals has determined that OMB Circular A-76, Department of Defense Directive 41004100.15, and Army Regulation 235-5 "fails to provide meaningful criteria against which a Court may analyze the Army's decision."

In this case, as in others, a District Judge would have no law to apply in determining whether or not a decision made by the agency was correct.

Section 806 is a statement of policy and legislative intent. It is a mandate from the legislative branch to the executive branch, but it is not replete with formulae or discernable guidelines against which the agency decision may be measured.

"Courts have been especially inclined to regard as unreviewable those aspects of agency decisions that involve a considerable degree of expertise or experience, or that are based upon economic projections and cost analyses, at least when the agency has broad leeway to devise the formula to be applied in any particular situation, and when there are no discernable guidelines against which the agency decision may be measured." That is a quote from the Third Circuit opinion that I mentioned a moment ago.

There were no such discernable guidelines or formulae prior to the inactment of Section 806, and it provides none. As previously determined, neither Section 806 nor its legislative history contain even the slightest indication that the Congress desires judicial review of agency decisions to contract out. Accordingly, it appears that the Administrative Procedures Act provides no basis for the judicial review of the agency decision to contract or the implementation thereof, in this case.

Also, we have been concerned with the standing of these Plaintiffs to sue. In order to pursue a cause of action as a party plaintiff, one must have a standing to sue. A right of action must exist to support any case,

but one must also be a proper party. Here, the individual plaintiffs and the organizational plaintiff have equal standing to sue or lack of same. Questions of standing to sue and the jurisdiction of Courts are among the most complex in the law. Generally, however, "standing exists if the plaintiff alleges that the challenge action has caused him injury in fact, economic or otherwise, and if the interest sought to be protected by the plaintiff is arguably within the zone of interest to be protected or regulated by the statute in question."

The clearly stated zone of interest to be protected by the statute, that is Section 806, is reserved to the Congress. The interests there are cost effectiveness, military efficiency, and the right of Congressional review and decision. Clearly, there is no inclusion of any of the plaintiffs in the zone of interest established in the statute.

Also raised, but not explored to the degree that would be necessary to base a decision upon is the issue of timeliness in the case.

Among other things contended by the Defendant is that the Plaintiffs' complaint is not timely brought. The statement of chronology brings into serious question the timing of the filing. Having known of the intended contracting procedure for months, the Plaintiffs filed a complaint on Thursday, August 21st. A jury session was then underway in the Augusta Division. Juries had been selected on August 18th for trials during that week and during the week of August 25th. Despite a heavy schedule, a hearing was set by the Court on the Plaintiffs request for a preliminary injunction and conducted on Wednesday, August 27th, 1980, and lasted, as I recall, for about one and a half or two hours and has been continued, of course, until today, the 29th day of August.

It should be noted that Pan American intervened on August 27th, 1980.

In this case, the Plaintiffs seek to enjoin a multi-million-dollar activity. This activity of the Department of Defense is scheduled to begin on September 1st, which, of course, is Labor Day, being the Monday following the Friday which is today.

The interests of the parties here are very important. The intended contracting procedure will save the Government over $20,000,000 according to the Defendant's representations. Many jobs are stake. Pan American has had the contract, although under appeal, since January of 1980.

The timeliness of the filing of the Plaintiffs' complaint, however, is not determinative here, because the Court has already concluded that it has no jurisdiction and that the Plaintiffs have no standing to sue. However, because of the potential importance of such a defense, the Court is compelled to observe, at least, that the Plaintiffs delay in filing a case with this import, with the extensive knowledge that Plaintiffs had since early 1980, is certainly an issue of glaring importance.

Whether or not there are extenuating circumstances or reasons to justify this delay is a matter for decision after an evidentiary hearing. Because of the other portions of this order, there is no necessity for an evidentiary hearing thereon.

Based upon the findings and the conclusions of law primarily which have been stated in the report of this Court, this session, and upon those considerations it appears, and I will enter today an order to this effect, with those stated findings and conclusions in the report that this District Court is without jurisdiction to proceed in the matter and that the Plaintiffs lack standing to prosecute the action. Accordingly, the application of the Plaintiffs for the issuance of preliminary injunctive relief is denied, and the case is dismissed.

I expect that the order will be entered in a very brief form, but filed before the close of Court business today.

Is there anything further?

MR. BOOTH: We have nothing.

MR. LEIDEN: We have nothing further at this time, Your Honor.

THE COURT: This Court will then be in recess.

(Hearing concluded.)

CERTIFICATE

GEORGIA:

RICHMOND COUNTY:

I hereby certify that the above and foregoing proceedings were taken down, as stated in the caption, and reduced to typewritting under my direction, and that the foregoing pages 1 through 16 represent a true, correct, and complete transcript of said proceedings.

This, the 17th day of September, 1980.

RICHARD A. DUERINGER, CCR-A-48
My commission expires the 5th day of May, 1984.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

Civil Action File No. ———

AMERICAN FEDERATION of GOVERNMENT EMPLOYEES, LOCAL 2017,
and *First Plaintiff*

JOHN C. CUMMINGS,
and *Second Plaintiff*

STERLING DUNN,
and *Third Plaintiff*

JOHN E. GUILLEBEAU,
vs. *Fourth Plaintiff*

HAROLD BROWN,
and *First Defendant*

CLIFFORD ALEXANDER, JR.,
and *Second Defendant*

WILLIAM J. HILSMAN,
and *Third Defendant*

WALTER L. MORRIS, JR.,
and *Fourth Defendant*

DONN A. STARRY,
_____ *Fifth Defendant*

VERIFIED COMPLAINT FOR
TEMPORARY RESTRAINING ORDER
TEMPORARY INJUNCTION, AND
PERMANENT INJUNCTIVE RELIEF

VERIFIED COMPLAINT

1

This is an action under Public Law 96-107, Section 806(a), the Due Process clause of the V Amendment, U.S. Constitution, 28 U.S.C. 1361, and the Federal Declaratory Judgment Act, 28 U.S.C. 2201, 2202 and to declare the conversion from performance by Department of Defense Civil Service Personnel to performance by a private contractor at Fort Gordon, Georgia illegally and to order temporary and final injunctive relief barring defendants from such conversion, to order defendants to comply with duties compelled in Public Law 96-107, and such other relief as may be necessary and proper.

JURISDICTION

2

This Court has jurisdiction over this action under 28 U.S.C. 1331(a), 5 U.S.C. 701 et seq., 28 U.S.C. 1361 and 28 U.S.C. 2201, 2202.

VENUE

3

Venue is properly set in this court under 28 U.S.C. 1391(e).

PARTIES

4

Plaintiff, American Federation of Government Employees, Local 2017, is a labor organization affiliated with the American Federation of Government Employees, AFL-CIO, and represents civilian employees of the Department of the Army, Department of Defense, employed at Fort Gordon, Georgia, who will lose other full-time civil service employment and all benefits resulting from such employment or suffer a reduction in grade because commercial and industrial type functions at Fort

Gordon, Georgia have been converted to performance by a private contractor. Plaintiff, AFGE Local 2017, will suffer injury in fact by loss of membership leading to a reduction in income and erosion in the number of people it is able to represent. An affidavit of the president of AFGE Local 2017, Ronald Klementowski, verifying the statements in this complaint is attached.

5

The individual plaintiffs are civilian employees of the Department of Defense, Department of Army, at Fort Gordon, Georgia, who will suffer injury in fact by loss of full-time civil service employment and all benefits resulting from such employment, or reduction in grade because commercial and industrial type functions at Fort Gordon have been converted to performance by a private contractor, or complete loss of employment.

6

Defendant, Harold Brown, Secretary of Defense, is sued in his official capacity as head of the department in which the conversion to contract performance has occurred and as such has the authority and responsibility to correct the actions which plaintiffs assert are violations of law.

7

Defendant, Clifford L. Alexander, Jr., Secretary of the Army, is sued in his official capacity as head of the military department within the Department of Defense in which the conversion has occurred and as such has the authority and responsibility to correct the actions which plaintiffs assert are violations of the law.

8

Defendant, General Donn A. Starry, is Commanding General of the United States Army Training and Doc-

trine Command, is used in his official capacity as head of the United States Army Command which has authority over operations at Fort Gordon, Georgia where the conversion occurred and as such has the authority and responsibility to correct the actions which plaintiffs assert are violations of law.

9

Defendant, Major General Wm. Hilsman, Commander of the U.S. Army operations at Fort Gordon, Georgia, is sued in his official capacity as commander of the facility where the conversion occurred and as such has the authority and responsibility to correct the actions which plaintiffs assert are violations of law.

10

Defendant, Walter L. Morris, Jr., is the contracting Officer for Contract No. DABT-A-79-R009, is sued in his official capacity as contracting officer for the functions converted and as such has the authority and responsibility to correct the actions which plaintiffs assert are violations of law.

CAUSE OF ACTION
COUNT I

11

On June 26, 1980, a contract (Contract #DABT-A-79-R-009) was awarded to Pan American Airways, Inc., a private contractor, by the Department of Defense, Department of the Army, for performance of certain commercial and industrial type functions at Fort Gordon, Georgia.

12

On or about June 26, 1980, all individual plaintiffs received a reduction in force notice indicating that they would lose their present civil service jobs; these notices

were issued as a direct result of the award of the contract to Pan American effective September 1, 1980.

13

Plaintiffs have exhausted all administrative remedies available to challenge the propriety and legality of the conversion of commercial or industrial type functions at Fort Gordon, Georgia, from performance by Department of Defense personnel to performance by a private contractor.

14

The commercial or industrial type functions of the Department of Defense personnel at Fort Gordon, Georgia, contracted by the Department of Defense, Department of the Army, to be performed by Pan American on or about June 26, 1980, with contracting performance to commence on or about September 1, 1980, were converted to circumvent a civilian personnel ceiling in violation of P.L. 96-107, 806(a)(1) which prohibits conversion of commercial or industrial type functions of the Department of Defense performed by Department of Defense personnel to performance by a private contractor to circumvent any personnel ceiling.

COUNT II

15

Plaintiffs reallege all statement contained in paragraphs 1 through 14.

16

On or about February 5, 1980, defendants, directly and by their designees, released a cost comparison comparing the costs to the Government of performing certain commercial or industrial type functions at Fort Gordon, Georgia, by Department of Defense personnel with the costs to the Government of performing those same commercial or industrial type function by utilizing a private contractor.

17

The government in-house calculation for the function was not based on an estimate of the most efficient and cost effective organization for in-house organization performance and therefore violates P.L. 96-107, Section 806, (a) (2) (A) which requires the Secretary of Defense to certify that the government in-house cost calculation for the function is based on an estimate of the most efficient and cost effective organization for in-house performance.

COUNT III

18

Plaintiffs reallege all statements contained in paragraphs 1 through 18.

19

The individual plaintiffs have a property interest in Federal employment entitled to V Amendment due process protection.

20

The actions by defendants in converting functions to contractor performance at Fort Gordon, Georgia, in violation of Public Law 96-107, Section 806 (a) are depriving plaintiffs of property rights without due process in violation of Amendment V of the Constitution of the United States of America.

COUNT IV

21

All other statements alleged in paragraphs 1 through 20 are hereby incorporated by reference.

22

The defendants and their designees have taken the position that the cost comparison study comparing the costs of in-house performance with the cost of contractor per-

formance was within the guideline of OMB Circular A-76.

23

Paragraph 6 d (iii) of OMB Circular A-76 prohibits contracting out solely to avoid personnel ceilings.

24

Public Law 96-107, while Section 806 (a) prohibits contracting out to avoid personal ceilings, Section 806 (a) goes beyond paragraph 6 p (iii) of OMB Circular A-76 by prohibiting any outside contracting to avoid personnel ceilings, it encompasses all breaches of paragraphs 6 b (iii) of OMB Circular A-76.

25

Paragraph 9 c (1) of OMB A-76 requires that each agency assured that Government operations are organized and staffed for the most efficient performance.

26

The requirements noted in OMB Circular A-76, paragraph 9 c (1) corresponds with the legal obligations of all officials within this department under Public Law 96-107, Section (a) (2) (A) to base the in-house estimate on the most cost efficient organization.

27

The intent of Public Law 96-107, Section 806 (a) was to elevate paragraphs six d (iii) and 9 c (1) of OMB Circuar A-76 to the status of law.

28

Plaintiffs AFGE Local 2017 filed an appeal of the cost comparisons under appeals procedures set forth in OMB Circular A-76, on or about February 19, 1980. When plaintiff AFGE Local 2017, on behalf of employees af-

fected by the contracting out at Fort Gordon, Georgia, appealed the defendants' decision under OMB Circular A-76, it did not have access to information which was solely in the control of the Government.

29

Included in the information solely within the control of the Government, were documents indicating defendants' intent to contract out to void personnel ceilings.

30

Plaintiff AFGE Local 2017, by letter dated February 7, 1980 asked for information pertaining to personnel ceiling under the Freedom of Information Act.

31

Reference to the last of information pertaining to personnel ceilings was made in Plaintiff, AFGE Local 2017, appeal under OMB Circular A-76.

32

Defendants' sole control of information relevent to whether a violation of Public Law 96-107, Section 806 (a) occurred while requiring plaintiff to exhaust the only appeal rights within the agency. The withholding of such information constitutes deprivation of plaintiffs' property interest without due process of law, and violates the V Amendment of the U. S. Constitution.

WHEREFORE, Plaintiffs pray for the following relief:

a] An order, pursuant to 28 U.S.C. 2201 et.seq., declaring that the conversion of certain commercial or industrial type functions at Fort Gordon, Georgia, by Defendants from performance by Plaintiffs to performance by a private contractor violates Public Law 96-107, Section 806 (a) and the due process clause of the V Amendment of the United States Constitution;

b] An order, in the nature of mandamus, requiring Defendants to perform the following ministenal and non-discretionary duties:

1] requiring defendants to re-do the cost comparison;

2] requiring defendants to re-do the in-house organization in order to base the in-house estimate on cost efficiency.

3] requiring defendants not to contract out to avoid personnel ceilings.

4] requiring defendants not to contract out commercial or industrial functions at Fort Gordon, Georgia pending compliance with (1) and (2) above.

c] A temporary preliminary and permanent injunction restraining defendants, and their successors in office, from implementing the conversion of commercial or industrial type functions at Fort Gordon, Georgia, from performance by plaintiffs to performance by a private contractor;

d] In the alternative to temporary and permanent injunctive relief, and order directing defendants to provide the individual plaintiffs reinstatement with full back pay and pension benefits;

e] An order awarding plaintiffs the costs of this action including attorneys fees; and

f] An order granting such other and further relief as may seem just and proper and as the exigencies of this case may demand.

Respectfully submitted,

/s/ Terrance P. Leiden
TERRANCE P. LEIDEN
Attorney for Plaintiffs

330 Telfair Street
Augusta, GA 30901
404-724-8548

STATE of GEORGIA
COUNTY of RICHMOND

PERSONALLY APPEARED before the undersigned attesting officer duly authorized to administer oaths, came Ronald Klementowski, who after first being sworn, deposes and states that the facts contained in the foregoing Complaint are true and correct to the best of his knowledge and belief.

/s/ Ronald Klementowski
RONALD KLEMENTOWSKI

Sworn and subscribed before me
this 21st day of August, 1980:

Notary Public
Richmond County, Georgia

Office-Supreme Court, U.S.
FILED
DEC 13 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-632

In the Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2017, ET AL., PETITIONERS

v.

CASPAR WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
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In the Supreme Court of the United States

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MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners contend that the court of appeals erred in holding that the Army's decision to contract out certain functions performed by its civilian employees was "committed to agency discretion by law" and therefore was not subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701(a)(2).

1. This case arises out of the Department of the Army's June 26, 1980 decision to contract out to private enterprise certain housing, maintenance, supply, service, and transportation functions performed by the Directorate of Industrial Operations and Housing at Fort Gordon, Georgia. Prior to making the contracting out decision, the Army undertook a study to determine the most efficient and cost-effective means of performing these functions in-house, and

solicited and received cost proposals from private contractors for the performance of the functions. As a result, the Army determined that the proposal offered by Pan American World Airways was the least costly and that it would yield approximately $32 million in savings over a 58-month period. Pursuant to the statute at issue here, the results of the Army's study were reported to Congress. The Army's tentative decision to contract out to Pan Am also was reported to Congress. Congress raised no objections to either the in-house cost calculations or the decision to contract out. Pet. App. 3a-4a.

After the contract was awarded to Pan Am, reduction-in-force notices were sent to 618 civilian employees at Fort Gordon, including the three individual petitioners.[1] These petitioners, joined by the local branch of their union, then filed suit in the United States District Court for the Southern District of Georgia to enjoin the Army from contracting out the work to Pan Am (Pet. App. 4a-5a). Petitioners alleged that the conversion of the Directorate's commercial and industrial functions from Army personnel to Pan Am violated Section 806(a) of the Department of Defense Authorization Act, 1980, Pub. L. No. 96-107, 93 Stat. 813, 10 U.S.C. (Supp. III) 2304 note. Specifically, petitioners claimed that the Army violated Section 806(a)(1) and (a)(2)(A) of the Act by contracting out these functions in order "to circumvent a civilian personnel ceiling" and by not basing its calculation for the performance of the functions in-house "on an estimate of the most efficient and cost effective organization for in-house performance." Pet. App. 26a-27a.

---

[1]The Army's contract with Pan Am required Pan Am to offer the displaced employees the right of first refusal for available positions for which they were qualified. Each of the individual petitioners was offered a position with Pan Am. Pet. App. 4a n.7.

The district court dismissed petitioner's complaint for lack of jurisdiction, concluding that the Army's conversion decision was not subject to judicial review (Pet. App. 16a-18a).[2] The court of appeals affirmed, holding (*id.* at 6a-9a) that the Army's decision to contract out fell within the "committed to agency discretion" exception to judicial review contained in 5 U.S.C. 701(a)(2).

2. a. The decision below does not conflict with any decision of this Court or any other court of appeals. To the contrary, as the court of appeals noted (Pet. App. 7a-8a), every court that has addressed the issue has held that conversion decisions made by Department of Defense officials under OMB Circular A-76, 44 Fed. Reg. 20556 (1979), revised, 45 Fed. Reg. 69322 (1980), the predecessor to Section 806(a), are insulated from judicial review. For example, in *Local 2855* v. *United States*, 602 F.2d 574, 581 (1979), the Third Circuit held that because the Circular failed "to provide meaningful criteria against which a court may analyze the Army's [contracting out] decision," that decision was not reviewable by the courts.[3]

---

[2]The district court also concluded that petitioners lacked standing to bring suit (Pet. App. 18a-20a). The standing issue was not addressed by the court of appeals (*id.* at 9a).

[3]Petitioners suggest (Pet. 7-8 n.18) that the court below erred in relying on cases that construed the Circular. As the court of appeals observed (Pet. App. 7a), however, "Section 806 in no way affected the nature of the conversion decision and imposed no new standards to guide the military's discretion. Except for the requirements of congressional notification and reporting, there were no restrictions on conversions in Section 806 that are not in OMB Circular A-76. Indeed, the OMB Circular is far more detailed and offers far more by way of guidelines for decisions than does Section 806." Accordingly, for the purpose of determining whether the contracting out decision is "committed to agency discretion by law," petitioners' position is not advanced by any distinctions between the Circular and Section 806.

b. Petitioners' disagreement (Pet. 6-9) with the court of appeals' decision is with its application of three specific criteria for determining whether certain administrative action has been committed by law to agency discretion. But this Court has only recently declined to review the validity of those criteria, and there is no reason for a different result here.

In *Bullard* v. *Webster*, 623 F.2d 1042 (1980), cert. denied, 451 U.S. 907 (1981), the Fifth Circuit held that 5 U.S.C. 701(a)(2) foreclosed judicial review of the FBI's decision to transfer an agent from one office to another. In so holding, the court observed (623 F.2d at 1046) that "agency action is committed to the agency's discretion and is not reviewable when an evaluation of the legislative scheme as well as the practical and policy implications demonstrate that review should not be allowed. * * * There must be a weighing of the need for, and feasibility of, judicial review versus the potential for disruption of the administrative process." More specifically, the *Bullard* court relied on the Third Circuit's decision in *Local 2855* v. *United States, supra*, for the following criteria of nonreviewability (623 F.2d at 1046):

> (1) the broad discretion given an agency in a particular area of operation, (2) the extent to which the challenged action is a product of political, economic or managerial choices that are inherently not subject to judicial review, and (3) the extent to which the challenged agency action is based on some special knowledge or expertise.

The court below simply applied the foregoing criteria to the facts of the present case. See Pet. App. 6a-7a. Accordingly, this case presents no issue warranting this Court's review.

c. Contrary to petitioners' assertion (Pet. 5), the court of appeals' interpretation of 5 U.S.C. 701(a)(2) is not inconsistent with *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971). In *Overton Park*, the Court held that Congress intended the "committed to agency discretion" exception to judicial review contained in Section 701(a)(2) to be applicable where " 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " 401 U.S. at 410, quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945). The exception was inapplicable in *Overton Park* because the statute in question there established clear and specific standards to guide the exercise of agency discretion. See 401 U.S. at 411.[4] By contrast, such standards are notably absent from Section 806 of the Department of Defense Authorization Act, 1980.

As the court of appeals noted, its "review of the legislative history convince[d it] that the overriding concern of Congress was to provide for increased congressional review and oversight of conversion decisions" (Pet. App. 7a n.13), rather than to establish standards to guide the Secretary's exercise of discretion in making the actual conversion decisions (see *id.* at 7a-8a). Moreover, as the Third Circuit noted in *Local 2855* v. *United States, supra*, 602 F.2d at 581 (emphasis added), "the scales are weighted heavily *against* continuation of in-house operations by the Army." Indeed, in-house operations constitute an exception to the "general policy of the Government to rely on competitive private enterprise to supply the products and services it needs." 44

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[4]Both Section 4(f) of the Department of Transportation Act and Section 18(a) of the Federal-Aid Highway Act provided that the Secretary of Transportation " 'shall not approve any program or project' that requires the use of any public parkland 'unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . .' " 401 U.S. 411, quoting 23 U.S.C. (Supp. V 1965-1969) 138; 49 U.S.C. (Supp. V 1965-1969) 1653(f).

Fed. Reg. 20558 (1979). In these circumstances, "[t]he absence of fixed standards reflects an understanding that the type of decision made by the Army here is necessarily a matter of judgment and managerial discretion, and is by and large an inappropriate subject for judicial review." 602 F.2d at 582-583.

d. Although the court of appeals did not reach the issue (Pet. App. 9a), we note our agreement with the district court's alternative holding (*id.* at 18a-19a) that dismissal of this action was also necessary because petitioners lacked standing to challenge the Army's contracting out decision. In *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), the Court held that in order to have standing to challenge an administrative action, a party must show not only that it was injured in fact by the action (*id.* at 152), but also that the interest it seeks to protect "is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" (*id.* at 153). See also *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979); *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 320-321 n.3 (1977).

Here, neither Section 806(a)(1)'s prohibition of conversions carried out for the purpose of circumventing civilian personnel ceilings nor Section 806(a)(2)(A)'s requirement that the Secretary of Defense notify Congress that he is studying a possible conversion was intended to protect petitioners' interest in maintaining civilian employment with the Army. Rather, as the district court noted (Pet. App. 19a), "[t]he clearly stated zone of interest to be protected by the statute * * * is reserved to the Congress. The interests there are cost effectiveness, military efficiency, and the right of Congressional review and decision." See also Pet. App. 7a n.13. Since petitioners' interest in maintaining

employment with the Army is not within any zone of interest that Section 806 was designed to protect, they lacked standing to bring this suit and the district court correctly dismissed the action on that ground.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1982

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[5]As petitioners have observed (Pet. 11-13 & n.29), although Section 806(a) expired with the close of fiscal year 1980, substantially similar provisions were contained in Section 502(a) of the Department of Defense Authorization Act, 1981, Pub. L. No. 96-342, 94 Stat. 1086, 10 U.S.C. (Supp. V) 2304 note. We note, however, that the significance of the question presented by this case is diminished by the fact that Section 502(a) applies only to the conversion of functions that were being performed by Department of Defense personnel on October 1, 1980.

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No. 82-632

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IN THE

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OCTOBER TERM, 1982

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2017, *et al.*,

Petitioners,

v.

CASPAR WEINBERGER, SECRETARY OF DEFENSE, *et al.*, AND PAN AMERICAN WORLD AIRWAYS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT PAN AMERICAN WORLD AIRWAYS, INC.

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December 13, 1982

QUESTION PRESENTED

Whether the decision of the Department of Defense to convert a commercial or industrial type function performed by civilian employees of the Department of Defense to one performed by a private contractor, reached after compliance with the procedural requirements of the 1980 Department of Defense Authorization Act (Pub.L. No. 96-107), is committed to agency discretion by law and, therefore, not subject to judicial review.*

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*The following is a list of all parent companies, subsidiaries and affiliates of respondent Pan American World Airways, Inc.:

Acerias Paz del Rio, S.A.
Aeronautical Radio, Inc.
Aeronautical Radio of Thailand, Ltd.
Agropecuaria Fluminense, S.A.
Air Cargo, Inc.
Air Carrier Supply, Inc.
Airline Tariff Publishing Co.
Ariana Afghan Airlines, Ltd.
Companhia Hoteleira Novos Horizontes, S.A.
Delsud Inversora, S.R.L.
Escola Americana de Rio de Janeiro
Hadrian, Ltd.
Honolulu Fueling Facilities Corp.
International Aeradio (Caribbean) Ltd.
International Aeradio Ltd. – London
Liberian Development Corp.
Manhattan Air Terminal, Inc.
Middle East Real Estate Co., S.A.L.
New York Airways, Inc.
Pan American Airways de Mexico, S.A.
Pan American World Services, Inc.
Pan Am Asset Management, Inc.
Pan Am Thrift Way, Ltd.
Pan American World Airways (South Africa)
PTY Ltd.
Portland Fueling Facilities Corp.
Private Investment Company for Asia, S.A.
Promotora de Hoteles de Turiamo Medellin, S.A.
Radio Aeronautica Paraguaya, S.A.
Social Immobiliaria Norteamerica, S.A.
Societe International de Telecommunications Aeronautiques

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No. 82-632

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AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2017, *et al.*,

Petitioners,

v.

CASPAR WEINBERGER, SECRETARY OF DEFENSE, *et al.*, AND PAN AMERICAN WORLD AIRWAYS, INC.,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENT PAN AMERICAN WORLD AIRWAYS, INC.

STATEMENT OF THE CASE

It has been the general policy of the federal government for a number of years to rely upon private enterprise to supply the products and services it needs except in circumstances in which in-house production or performance is determined to be more cost-effective. This policy is currently reflected in Office of Management and Budget ("OMB") Circular A-76, 44 *Fed. Reg.* 20556 (April 5, 1979), *revised*, 45 *Fed. Reg.* 69322 (October 20, 1980), which sets forth detailed guidelines for determining when to contract out work performed by government employees. Certain of these guidelines were in turn elevated to the status of law by virtue of section 806(a) of the Department of Defense Authorization Act, 1980.[1]

[1] Pub.L. No. 96-107, 93 Stat. 813 (1979). The pertinent portions of section 806(a) are set forth at n. 4 of the petition for certiorari, Pet. at 2 n. 4, and at n. 6 of the decision of the court of appeals in this case, attached as Appendix A to the petition, Pet. App. at 3a n. 6. References

This case arose from the decision in June 1980 by the Department of Defense to contract with respondent Pan American World Airways, Inc. ("Pan Am") to perform certain support functions formerly performed by civilian Army employees at Fort Gordon, Georgia. Petitioners American Federation of Government Employees, Local 2017, and three former employees (collectively, "AFGE") filed suit to block the conversion, alleging that the Department of Defense's decision to contract out had been made in violation of section 806(a) of Pub. L. No. 96-107. AFGE's suit was dismissed by the district court for lack of jurisdiction and standing (Pet. App. at 10a). The district court's jurisdictional holding was affirmed by the court of appeals, which held that the decision to contract out is committed to agency discretion by law, within the meaning of 5 U.S.C. § 701(a)(2), and therefore not subject to judicial review. *AFGE, Local 2017* v. *Brown*, 680 F.2d 722 (11th Cir. 1982). AFGE now seeks a writ of certiorari to review the decisions of the courts below.

The statement of the case presented in AFGE's petition for certiorari is accurate as far as it goes, but is strikingly silent as to the facts relevant to AFGE's substantive claims against the government – *i.e.*, the actions taken by the Department of Defense to comply with section 806(a). These facts, which the district court found to be undisputed (Pet. App. at 12a-13a) and which are not contested in AFGE's petition, were set forth in detail in the opinion of the court of appeals:

> . . . Prior to making the contracting out decision the Army conducted an analysis of the functions to determine whether a cost savings could in fact be achieved by conversion to a private contractor. As a part of this analysis the Army first performed a study to determine the most efficient and cost-effective organization for in-house performance of these functions. The Army then solicited and received cost proposals

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in this brief to the petition for certiorari will be made in the form, "Pet. at ____." References to the appendices to the petition will be made as "Pet. App. at ____."

> from private contractors for the performance of the functions. The cost proposal offered by Pan Am was determined to be the lowest of all the contractors. The Army compared Pan Am's cost proposal with the cost calculation for in-house performance and determined that an estimated 58-month savings of approximately $32 million could be achieved by contracting with Pan Am for the performance of the functions.
>
> The results of the Army's study were reported to Congress, including a certification that the Army's in-house cost calculation for the functions was based on an estimate of the most efficient and cost-effective organization for in-house performance. The Army's tentative decision to contract out to Pan Am was also reported to Congress. Congress raised no objections to the in-house cost calculations or to the decision to contract out.

680 F.2d at 724-25 (Pet. App. at 4a). Against this background, it is clear that this case does not present the question of whether *any* judicial review of a conversion decision may be had. Rather, the issue decided below was whether, the procedural requirements of section 806(a) having been satisfied, judicial review may be had of the substantive decision to contract out.

SUMMARY OF ARGUMENT

AFGE's contention that a "conflict in principle" exists between the decision below and *Citizens to Preserve Overton Park* v. *Volpe*[2] is simply incorrect. In holding that conversion decisions are committed to agency discretion by law, within the meaning of 5 U.S.C. § 701(a)(2), the court of appeals examined both the language of section 806 and the nature of the agency decision involved. This analysis is fully consistent

[2] 401 U.S. 402 (1971).

with prior decisions of this Court, including *Citizens to Preserve Overton Park* v. *Volpe*, and is indistinguishable from the analysis conducted in numerous decisions by other courts of appeals. Moreover, the decision below was obviously correct, as confirmed by the uniform holdings of other courts that military conversion decisions are not judicially reviewable and by legislative events both before and after enactment of section 806.

Nor does this case present an important issue of law which should be decided by this Court. The federal policy in favor of contracting out has been in existence for nearly three decades, and literally thousands of conversion decisions have been made during that time. The issue decided below was thus hardly novel, nor was it difficult. The court of appeals applied well established, "garden variety" principles in an obviously correct manner. No reason exists, and certainly AFGE has stated none, for this Court to review that decision.

ARGUMENT

AFGE has asserted two grounds in support of issuance of a writ of certiorari in this case – that the court of appeals' interpretation of 5 U.S.C. § 701(a)(2) "conflicts in principle" with this Court's decision in *Citizens to Preserve Overton Park* v. *Volpe* and that an important issue of law is presented which should be decided by this Court. Neither contention has merit.

1. To draw a conflict between the decision below and *Citizens to preserve Overton Park*, AFGE characterizes (a) the court of appeals' decision as having applied a test which looks only to the nature of the agency decision involved and (b) the decision in *Citizens to Preserve Overton Park* as having established that a court may examine only the language of the statute at issue. (Pet. at 6.) Neither characterization is accurate.

First, the court of appeals explicitly stated that the determination of whether agency action is committed to discretion by law requires "an evaluation of the legislative scheme as well as the practical and policy implications [of judicial

review]."[3] That is, the court of appeals held that an examination of *both* the statute and the agency decision involved is required, and its opinion bears out that it examined both factors.[4] AFGE's contrary assertion is simply false.

Second, the Court in *Citizens to Preserve Overton Park* held only that the proper inquiry under 5 U.S.C. § 701(a)(2) is whether "there is no law to apply."[5] The Court did not hold that in conducting that inquiry, a court may not look to the nature of the agency decision involved, as evidenced by the fact that, in determining whether particular decisions were committed to agency discretion by law, this Court in numerous decisions has itself examined the nature of the decision as well as the potential impact of judicial review on the administrative process.[6]

Indeed, in many cases it is difficult to conceive how a court could determine whether "there is law to apply" without examining the agency action to which the law is to be applied. As the United States Court of Appeals for the District of Columbia Circuit has emphasized:

> In practice, the determination of whether there is "law" to apply necessarily turns on

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[3] 680 F.2d at 725 (Pet. App. at 6a), quoting from *Bullard* v. *Webster*, 623 F.2d 1042, 1046 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981).

[4] Thus, for example, the court of appeals stated that "[w]e agree with the finding of the District Court that Section 806 vests the Army with broad discretion . . . and provides no legal standard for the court to apply." 680 F.2d at 726; Pet. App. at 7a. The court continued:

> [T]he District Court in the case at hand concluded correctly that because Section 806 lacked discernible guidelines "a District Judge would have no law to apply in determining whether or not a decision made by the agency was correct." *AFGE, Local 2017* at 11-12.

680 F.2d at 726; Pet. App. at 8a.

[5] *Citizens to Preserve Overton Park, supra*, 401 U.S. at 410.

[6] *See, e.g., Southern R. Co.* v. *Seaboard Milling Corp.*, 442 U.S. 444, 456-57 (1979); *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970); *Schilling* v. *Rogers*, 363 U.S. 666, 674-75 (1960).

> pragmatic considerations as to whether an agency determination is the proper subject of review. . . . In making this determination, we first identify as precisely as possible the aspects of the agency's action against which challenge is brought. We then evaluate the relevance of three particularly important factors: the need for judicial supervision to safeguard the interests of the plaintiffs; the impact of review on the effectiveness of the agency in carrying out its congressionally assigned role; and the appropriateness of the issues raised for judicial review.[7]

Accordingly, the courts of appeals, including those circuits cited by AFGE for the contrary proposition (Pet. at 6 n.14), have uniformly held it proper to weigh pragmatic considerations of the sort identified by the court below in determining whether judicial review is precluded by 5 U.S.C. § 701(a)(2).[8] The "conflict in principle" alleged by AFGE between the decision below and *Citizens to Preserve Overton Park* is thus nonexistent.

Moreover, the court of appeals' application of these established principles was obviously correct. The court's holding

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[7] *Natural Resources Defense Council, Inc.* v. *SEC*, 606 F.2d 1031, 1043-44 (D.C. Cir. 1979) (citations omitted). Professor Davis cites this decision approvingly as reflecting the trend of the cases. Davis, *Administrative Law Treatise*, § 28.16-1 at 512 (1982 Supp.).

[8] *See, e.g., Rank* v. *Nimmo*, 677 F.2d 682, 700 (9th Cir. 1982); *Gifford* v. *SBA*, 626 F.2d 85, 87 (9th Cir. 1980); *Bullard* v. *Webster*, 623 F.2d 1042, 1046 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981); *Sinai Hospital of Baltimore, Inc.* v. *Horvitz*, 621 F.2d 1267, 1270 (4th Cir. 1980); *NRDC* v. *SEC, supra; Board of Trade of Chicago* v. *CFTC*, 605 F.2d 1016 (7th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980); *Local 2855, AFGE* v. *United States*, 602 F.2d 574, 578-79 (3rd Cir. 1979); *Davis Associates, Inc.* v. *HUD*, 498 F.2d 385, 390 (1st Cir. 1974); *Hahn* v. *Gottlieb*, 430 F.2d 1243, 1249 (1st Cir. 1970); *Kletschka* v. *Driver*, 411 F.2d 436, 443 (2d Cir. 1969). *See also*, Davis, *Administrative Law of the Seventies*, § 28.16-1 at 641 (1976).

that the Army's conversion decision was nonreviewable rested on four conclusions – (1) that Congress' purpose in enacting section 806(a) was to provide for increased congressional oversight of conversion decisions and not to create a private cause of action for government employees dissatisfied with such decisions; (2) that the express language of section 806(a) provides no discernible guidelines to apply in determining the correctness of a conversion decision; (3) that the Army's decision to contract out involves military and managerial choices inherently unsuitable for judicial consideration; and (4) that the decision is based upon considerations of efficiency and cost-effectiveness best resolved by application of the special expertise of the Army officials involved.[9]

In this respect, the court of appeals' decision was consistent with, and relied upon, a uniform line of cases holding that Department of Defense conversion decisions under the substantially more detailed guidelines of OMB Circular A-76 are committed to agency discretion.[10] The court of appeals'

[9] 680 F.2d at 726-27; Pet. App. at 7a-9a.

[10] See cases cited at 680 F.2d at 726; Pet. App. at 7a-8a. AFGE's suggestion that the court of appeals erred in relying upon these cases (Pet. at 7-8 n. 18) is simply incorrect. As the court of appeals noted (680 F.2d at 726; Pet. App. at 7a), section 806(a) imposed no new standards, policy objectives, goals or guidelines for contracting out not already set forth in OMB Circular A-76. The prohibition on conversion for the purpose of circumventing personnel ceilings set forth in section 806(a)(1), for example, is contained in OMB Circular A-76, paras. 6 and 8. Similarly, each element of the certification and report required under section 806(a)(2)(A) is also required to be prepared under the OMB Circular. The only change occasioned by section 806 was the requirement of prior notification, reporting, and certification to Congress. Indeed, OMB Circular A-76 is far more detailed than section 806. The cases relied upon by the court of appeals which have held that A-76 provides inadequate criteria for judicial review thus apply with even more force to section 806. AFGE's additional argument that these decisions are distinguishable since the OMB Circular is an internal executive branch management tool, while section 806 is a statute, also fails. Although that fact might provide an additional ground for sustaining the A-76 decisions, it was not the basis of those decisions, which rested upon the unavailability of adequate standards to guide judicial review. *See, e.g., Local 2855, AFGE* v. *United States*, 602 F.2d 574, 579-83 (3rd Cir. 1979). The rationale of the cases decided under the OMB Circular is thus fully applicable to cases brought under section 806.

decision also derives substantial support from the fact, not mentioned in the court's opinion but addressed in the briefs below, that Congress was aware of the cases holding conversion decisions unreviewable when it adopted section 806(a) but made no provision to alter that result.[11] More importantly, the following year, a provision which would have authorized judicial review of conversion decisions passed the House but was deleted in conference.[12] These events suggest strongly that section 806 was not intended to overrule settled law holding that military conversion decisions are not subject to judicial review.

2. In support of its second ground for granting certiorari, that the case involves an important issue of law which should be settled by the Court, AFGE has asserted only that the rights of thousands of Department of Defense civilian workers to obtain judicial review of conversion decisions are at stake. (Pet. at 12-13.) AFGE's petition, however, sets forth no reasons why guidance from this Court is "crucial." In view of the fact that the decision below was consistent, both in principle and in substance, with prior decisions of this Court and other courts of appeals, Pan Am respectfully suggests that

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[11] *See, e.g.*, 125 *Cong. Rec.* H7913 (daily ed. Sept. 14, 1979) (remarks of Rep. Harris).

[12] As noted in AFGE's petition (Pet. at 12-13), section 502 of the Department of Defense Authorization Act for fiscal year 1981, Pub.L. No. 96-342, 94 Stat. 1077 (1980), is substantially similar to section 806. Rep. Kazen introduced an amendment authorizing judicial review of contracting out decisions "in recognition of the fact that previously U.S. District Courts have refrained from assuming jurisdiction to review contracting out actions . . . ." 126 *Cong. Rec.* H3716 (daily ed. May 15, 1980). The amendment passed the House, but was deleted in conference. *See* H.R. Rep. No. 96-1222, 96th Cong., 2d Sess. 93, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2666, 2669. In analogous circumstances, the court in *Lloyd A. Fry Roofing Co.* v. *EPA*, 554 F.2d 885, 890 (8th Cir. 1977), observed that "action of the Conference Committee in deleting language that would have expressly reserved the right to . . . review . . . strongly suggests that the intent of the omitted portion was rejected in the bill as passed." Similarly, this Court has previously noted the propriety of referring to subsequent legislative events to divine the original intent of Congress. *See, e.g., Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-81 (1969).

no such reasons can be given. Contracting out actions have been taken for many years by the Department of Defense and other federal agencies. The issue decided below is thus neither novel nor particularly difficult.

AFGE has not demonstrated the existence of any problem deriving from the present state of the law which requires diversion of the scarce resources of this Court for solution. To the extent AFGE and the government employees it represents are unhappy with a particular conversion decision, their remedy lies with Congress, not with this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 82-632

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2017, *et al.*,
Petitioners,

v.

CASPAR WEINBERGER, Secretary of Defense, *et al.*, and PAN AMERICAN WORLD AIRWAYS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONERS

For the reasons which follow, petitioners American Federation of Government Employees, Local 2017, et al., submit that the Federal respondents (hereinafter "the Government") and Pan American World Airways, Inc. (hereinafter "Pan Am") have failed to provide rationale for denying the petition for certiorari.[1]

Pan Am makes the egregious suggestion that the district court found as a matter of fact that contracting out of the services formerly performed by Federal work-

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[1] References to the Government's memorandum in opposition will be made in the form "Government Opp. at ——." References to Pan Am's brief in opposition will be made in the form "Pan Am Opp. at ——." References to petitioners' appendices to the petition will be made as "Pet. App. at ——."

ers to a private contractor was cheaper. Pan Am Opp. at 2-3. However, the district court dismissed the complaint without ever hearing any evidence. The excerpt of the court of appeals opinion cited by Pan Am merely recounts what the Army's cost study asserted.[2] Petitioners in their complaint challenged the accuracy of the Army's cost study so that whether it was in fact cheaper to contract out is a matter of dispute.[3]

Pan Am also wrongly implies that Section 806 did not create requirements on a decision to contract out. Pan Am Opp. at 3. Section 806(a)(1) prohibits contracting out to circumvent personnel ceilings and Section 806(a)(2)(A) requires a cost study prior to contracting out in which an estimate of the costs of in-house performance is based upon the most efficient and cost-effective organization. Whether these provisions are deemed "procedural" or "substantive" requirements, the compliance with both Section 806(a)(1) and Section 806(a)(2)(A) was in dispute.[4] Thus, the Government's compliance with the mandates of Section 806 was squarely before the lower courts.[5]

The respondents' analysis of the language in *Citizens to Preserve Overton Park v. Volpe*[6] is faulty and leads to erroneous conclusions.[7] For example, Pan Am asserts

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[2] 680 F.2d at 724-25; Pet. App. at 4a.

[3] Pet. App. at 26a-27a, 14-17.

[4] To the extent Pan Am characterizes these requirements as "procedural", it must still be recognized that petitioners challenged the accuracy of the cost study based on an inflated in-house estimate, and as prompted by personnel ceilings. It cannot be said therefore that compliance with "procedural" requirements was conceded. See note 3, *supra*.

[5] Significantly, the Government in its opposition does not raise this specious argument.

[6] 401 U.S. 402 (1971).

[7] Pan Am Opp. at 5; Government Opp. at 5.

that the Court in *Citizens to Preserve Overton Park* did not hold that a court is precluded from focusing on considerations apart from the statutory language. (Pan Am Opp. at 5). However, this assertion ignores what the Court stated in *Citizens to Preserve Overton Park*—*i.e.*, that 5 U.S.C. § 701(a)(2) is "*only applicable* in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"[8] Since the focus is on the language of the statute at issue, it therefore follows that the terms of the statute, rather than the nature of the agency decision is the focus of the inquiry.[9]

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[8] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. at 410, citing S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945). Contrary to Pan Am Opp. at 5, n.6, this Court has not indicated for 5 U.S.C. § 701(a)(2) purposes that criteria beyond the language of the statute are relevant. In *Southern R. Co. v. Seaboard Milling Corp.*, 442 U.S. 444, 456-57 (1979), the discussion of the practical effects of reviewability went not to standards but to whether Congress intended to preclude review, a 5 U.S.C. §§ 701(a)(1) issue. Both *Barlow v. Collins*, 397 U.S. 159 (1970) and *Schilling v. Rogers*, 363 U.S. 666 (1960) predate *Citizens to Preserve Overton Park*. Additionally, *Barlow* concerned the 5 U.S.C. § 701(a)(1) review preclusion and was in terms of statutory construction, 397 U.S. at 166. *Schilling* concerned 5 U.S.C. § 701(a)(2) but based nonreviewability on the absence of statutory mandates on the point in dispute. 363 U.S. at 674-75.

[9] In response to Pan Am's assertion that the court of appeals looked at the nature of the agency decision as well as the statutory language (Pan Am Opp. at 4-5), petitioners submit that is precisely the point which petitioners submitted in their petition. Pet. at 6-7. While the statutory language was part of the "nature of the agency decision", the court of appeals relied on visceral concerns that were unrelated to the statutory language. It is the overexpansive reading of the 5 U.S.C. § 701(a)(2) exception to judicial review that caused the court of appeals to err in precluding review.

Also, contrary to the suggestion in Pan Am Opp. at 6, n.7, Professor Davis was not discussing judicial review of agency administrative actions when he discussed *Natural Resources Defense*

Both Pan Am and the Government also reference earlier decisions under Office of Management and Budget (OMB) Circular A-76, 44 Fed. Reg. 20556 (1979), revised 45 Fed. Reg. 69 322 (1980), as a basis for the court of appeals decision.[10] In this regard Pan Am wrongly states that OMB Circular A-76 contains more detailed guidelines than Section 806.[11] Yet the cases relied upon do not stand for this proposition simply because OMB Circular A-76 did not create *any* legally cognizable standard.[12] Thus, for *Citizens To Preserve Overton Park* purposes. OMB Circular A-76 did not create "law to apply." In fact, the reason for the enactment of Section 806 was to elevate provisions of OMB Circular A-76 to the "status of law." [13]

Merely an examination of the practical effect of Pan Am's and the Government's reliance on the OMB Circular A-76 cases demonstrate the absence of basis for the Respondent's reliance. Both respondents have used these cases as a means of suggesting that the decision to contract out, whether under OMB Circular A-76 or Section 806, is the appropriate focus rather than analyzing

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Council, Inc. v. SEC, 606 F.2d 1031, 1043-44 (D.D. Cir. 1979). Instead, Professor Davis was discussing an agency's discretion not to adopt rules after rulemaking proceedings. See Davis, *Administrative Law Treatise*, § 28.16-1, 512-13 (1982 Supp.).

[10] Pan Am Opp. at 7; Government Opp. at 3.

[11] *Id.*

[12] *Local 2855, AFGE v. United States*, 602 F.2d 574, 582, n.28 (3rd Cir. 1979), *AFGE Local 1872 v. Stetson*, 86 Lab. Cas. (CCH) ¶ 33,819 at 48, 851 (D.D.C. 1979). In *Local 2855*, the court specified that 5 U.S.C. § 701(a)(2) did not preclude review where charges are made that a decision violates statutory command. 602 F.2d at 580. Petitioners made precisely that allegation here.

[13] 125 CONG. REC. H7913 (daily ed. Sept. 14, 1979) (statement of Rep. Harris). Pan Am concedes that OMB Circular A-76 guidelines were elevated to the status of law by Section 806. Pan Am Opp. at 1.

the standard of Section 806. However, this would mean that even if Congress enacted legislation with the most finite standards and the most explicitly stated desire for judicial review, a court may still decline review because of the nature of the agency decision. Such an analysis would stretch section 701(a)(2) far beyond its intended limited applicability.

Pan Am disingenuously suggests that the court of appeals decision is supported, though not addressed by the court of appeals, by the absence of a judicial review provision in either section 806 or successor legislation.[14] This argument was specifically raised by the respondents before the court of appeals as an alleged basis for preclusion of review under 5 U.S.C. § 701(a)(1) (1976).[15] Based upon the briefs and arguments presented, the court of appeals expressly rejected the argument Pan Am raises here.[16] The Government raises a matter of stand-

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[14] Pan Am Opp. at 8.

[15] Specifically, 5 U.S.C. § 701(a)(1) provides:

> (a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review

[16] Pet. App. at 6a; *AFGE Local 2017 v. Brown*, 680 F.2d 722, 725 (11th Cir. 1982), citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1976). See Pet. App. at 6a, n.11. The United States District Court for the District of Rhode Island in *International Association of Firefighters (IAFF), Local F-100 v. Department of the Navy*, 536 F. Supp. 1254 (D.R.I. 1982) reached the same decision as the court of appeals did in analyzing the successor legislation to Section 806. 536 F. Supp. at 1265. See also H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946). These decisions are fully consistent with the intent of Section 806 to elevate provisions of OMB Circular A-76 to the status of law. See note 13, *supra*. Finally, even the presence of language which appears to bar judicial review (a situation more extreme than the present since both Section 806 and its successor legislation have no express language suggesting judicial review is barred) may not preclude judicial review. *Heikkila v. Barber*, 345 U.S. 229, 233 (1953); *Breen v. Selective Service System*, 396 U.S. 460 (1970).

ing that is equally nongermane to the instant petition.[17] The court of appeals did not rule on the standing matter and this Court has previously held that without a lower court opinion on the legal issue, the Court will normally decline to consider a legal claim.[18] Nevertheless, a reading of the language of Section 806 and its legislative history indicate that petitioners are within the zone of interest of the statute.[19]

Finally, Pan Am erroneously suggests that the issue in this case is "neither novel nor particularly difficult."[20] However, this is the first action brought under legislation designed to eliminate the enforcement problems found under OMB Circular A-76.[21] Pan Am's argument ignores that Congress was responding to those very cases upon which Pan Am relies. Thus, the circumstances of

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[17] Government Opp. at 6-7.

[18] *National Labor Relations Board v. Sears Roebuck & Co.*, 421 U.S. 132, 164 (1975).

[19] For example, specific references to Federal employees in the language of Section 806 may be found in the introductory language of Section 806(a) ("no . . . function . . . being performed by *Department of Defense personnel* may be converted"), in the requirement of a cost comparison under Section 806(a)(2)(A), and in the requirement made of the Secretary of Defense under Section 806(a)(2)(B)(i) to compile a report on the economic effect on employees if more than fifty jobs are contracted out. These statutory provisions demonstrate a concern for the protection of Federal employees where wasteful contracting out occurs and/or where many employees are affected. Further concern for Federal workers is evident in the legislative history. See, e.g., 125 CONG. REC. H7913 (daily ed. September 14, 1979) (statement of Congressman Kazen). Significantly, the court in *IAFF, Local F-100 v. Department of the Navy, supra*, found that Congress chose not to deny standing explicitly in the successor legislation to Section 806. 536 F. Supp. at 1265.

[20] Pan Am Opp. 8-9.

[21] 125 CONG. REC. H7913 (daily ed. September 14, 1979) (statement of Rep. Harris).

the present case are far different from the cases relied upon by Pan Am in asserting that the issue is "neither novel or difficult." [22]

On the basis of the petition for certiorari and this reply brief, the petition for certiorari should be granted.

Respectfully submitted,

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[22] The Government concedes the existence of new legislation but offers a misreading of Section 502(a) of the Department of Defense Authorization Act, 1981, Pub. L. No. 96-342, 94 Stat. 1086, 10 U.S.C. (Supp. V) § 2304 note. See Government Opp. at 7, n.5. In fact, Section 502(a) applies to any potential contracting out of Federal work in the Department of Defense after October 1, 1980.